United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7081

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VINCENZO BURRAFATO and
ANTONINA BURRAFATO,

Appellants,

-against-

U.S. DEPARTMENT OF STATE and U.S.
IMMIGRATION & NATURALIZATION SERVICE,

Appellees.

On Appeal from an Order of the United States District Court for the Eastern District of New York

APPELLANTS' REPLY BRIEF

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Appellants
515 Madison Avenue
New York, N.Y.
(212) 688-8555

JOSEPH P. MARRO
MARTIN L. ROTHSTEIN
Of Counsel

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Preliminary Statement

This Reply Brief is submitted to the Court pursuant to Rule 31(a) of the Federal Rules of Appellate Procedure. The purpose of this brief is to respond to the several misstatements of fact and erroneous legal arguments contained in the Appellees' Brief, which was received by Appellants in page proof form on April 29, 1975, only seven days prior to the date scheduled for oral argument, May 6, 1975. *

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*Hence, this Reply Brief is submitted within the fourteen day period prescribed by Rule 31(a) of the Federal Rules of Appellate Procedure.

Statement of the Facts

The pertinent facts in this case have been set forth with particularity in the Appellants' Brief filed with this Court on March 27, 1975, and reference is respectfully made thereto. (Appellants' Brief, pp. 3,4). However, before proceeding to the legal arguments, we wish to correct certain misstatements of fact contained in the Appellees' Brief.

It is not true that the appellant, Vincenzo Burrafato (hereinafter, "Burrafato") was found deportable as an "uninspected resident" alien as asserted several times by Appellees. Burrafato was charged with being an immigrant who at the time of his admission to the United States, was not in possession of a valid immigrant visa (20a). Sections 241(a)(1) and 212(a)(20) of the Immigration & Nationality Act (hereinafter, the "Act"), 8 U.S.C., Secs. 1251(a)(1) and 1182(a)(20). The manner of his entry into this country was not part of any charge, nor did it enter into the Immigration Judge's decision, which simply found Burrafato deportable, on counsel's concession, for not being in possession of an immigrant visa at the time of his entry into the United States (22a).

Additionally, the Appellees imply that Burrafato was uncooperative at the deportation hearing in refusing to answer questions concerning his entry into this country. Even

if there were any support for this assertion in the record (and indeed, Appellees have not referred to any, and cannot), it is nevertheless irrelevant. The manner of Burrafato's entry was totally unrelated to the charge against him and utterly irrelevant, in view of his having conceded deportability. Moreover, the Immigration Judge granted Burrafato the discretionary privilege of voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C., Sec. 1254(e), thus finding that he is a person of good moral character who warranted favorable consideration.

ARGUMENT

POINT I.

APPELLANTS SEEK REVIEW OF THE DECISION OF THE DEPARTMENT OF STATE IN AFFIRMING THE DENIAL OF A VISA WITHOUT PROVIDING ANY REASONS OR JUSTIFICATION

The thrust of the Appellees' argument is that no Court of the United States has jurisdiction to examine into the legal validity of a decision of a foreign consul, even if such decision is on its face illegal, wholly arbitrary, and in violation of statute and regulations. However, this suit does not seek review of a consular determination, but rather seeks review of the decision of the Department of State, an agency and instrumentality of the United States. In this

case, the Consul's decision was reviewed and approved by officials of the Visa Office of the Department of State in Washington, D.C., which had the power and duty to overrule an incorrect interpretation of law, 22 CFR Sec. 42.130(c).

As evidence of their untenable position, the Appellees fail to discuss, much less attempt to distinguish, the Supreme Court's decision in Kleindienst v. Mandel, 408 U.S. 753 (1972). There, the alien was denied a nonimmigrant visa by the consul on the ground that he was ineligible for admission to the United States under Section 212(a)(28) of the Act, 8 U.S.C. Sec. 1182(a)(28), and a waiver of this exclusionary impediment was also denied by the Department of State. Section 212(d)(3)(A) of the Act, 8 U.S.C. Sec. 1182(d)(3)(A). The Supreme Court squarely held that it had jurisdiction to review the determination of the Department of State in refusing to grant the waiver and hence reviewed the denial of the visa itself. See also: MacDonald v. Kleindienst, unreported, (S.D.N.Y., October 20, 1972) (hereinafter referred to as "MacDonald #1")(38a-43a).

Moreover, pursuant to the Department of State's own regulations, a specific procedure is established for review of consular determinations. 22 C.F.R., Sec.42.130. In accordance with those regulations, the Department of State is empowered to examine consular action and its rulings "... concerning an interpretation of law ... shall be binding upon

consular officers". 22 C.F.R. Sec. 42.130(c). Thus, in rejecting the Appellants' claims, the Department of State has sanctioned certain legal principles which are the subject of attack herein. These issues as raised by Appellants are, (a) Whether it is necessary to inform a visa applicant which of 31 different subdivisions of Section 212(a) of the Act is the basis of the visa denial (b) Whether subdivision (27) of Section 212(a) of the Act contemplates persons believed to be "associated with organized criminal society", and (c) whether an alien and his citizen wife have any right to learn the basis of the visa denial and can be denied an opportunity to refute this information where a regulation confers such rights upon them [22 C.F.R. Sec. 42.130(a) and (b)]. We submit, therefore, that there can be no valid reason why this Court should not review the Department's decision in order to correct errors of law and to prevent a manifest injustice to an alien, his United States citizen wife and permanent resident children.

In further compounding their error, the Appellees make the absurd argument that the Department of State is not under any obligation to review a Consul's decision and that it is powerless to correct any such error. (Appellees' Brief, pp. 5-6). This argument is not only wrong but begs the question. Whether the State Department has discretion to review consular action and when it chooses to exercise

this authority, is totally irrelevant to this case, as in fact, the State Department has reviewed the visa denial and has affirmed the consul's determination (35a). Moreover, as discussed above, by regulation, its rulings on matters of law are mandatorily binding upon consular officers. 22 C.F.R. Sec. 42.130(c).

Furthermore, although this Court need not reach the issue, the Appellees contend that several Courts have held that consular determinations are immune from review. The Appellants submit that this proposition is of doubtful validity today. In support of their argument, Appellees quote a portion of the decision in Galvan v. Press, 347 U.S. 522 (1954). However, that case concerned a review of an administrative order of deportation and did not involve any decision of a foreign consul. Moreover, the language of the Supreme Court therein is peculiarly appropriate to the case at bar. There the Court stated:

> The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security. Nevertheless, considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that [the charges against him are false] ... strikes one with a sense of harsh incongruity. If due process

> bars Congress from enactments that shock the sense of fair play -- which is the essence of due process -- one is entitled to ask whether it is not beyond the power of Congress to deport an alien [without allowing him an avenue for review]. And this because deportation may, as this Court has said in Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938, deprive a man ' of all that makes life worth living'; and, as it has said in Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433; 'deportation is a drastic measure and at times the equivalent of banishment or exile'. (at p. 530).

Appellees also appear to rely upon three cases to support their argument on lack of jurisdiction. In Lem Moon Sing v. United States, 158 U.S. 538 (1895), the Court held there was no jurisdiction to review the exclusion of a Chinese alien under a specific statute, no longer in effect, which denied entry to Chinese aliens and made such decisions final and not subject to judicial review. In United States v. Phelps, 22 F.2d 288 (2nd Cir. 1929), the Court refused to disturb the exclusion of a nonimmigrant who sought to enter the United States without a passport and visa, as such documentation was required by the statute then in effect. Finally, in Licea-Gomez v. Pilliod, 193 F.Supp. 577 (N.D. Ill.), the alien sought review of an order of exclusion. The Court limited its review to whether the hearing was fair and whether the statutory requirements were followed, but refused to consider the alien's claim of eligibility for citizenship as irrelevant to his exclusion. However, all these cases were decided prior to the promulgation of 22 C.F.R., Sec. 42.130, governing the procedures in refusing visas which became effective in March 1963, and none of these cases concerned review of a decision by the

Department of State on matters of law.

Additionally, there seems to be no justification for immunizing decisions of a minor functionary of the State Department, especially where such decisions seem to be contrary to law. Certainly, if decisions of state legislatures regarding voting districts are subject to review [Baker v. Carr, 369 U.S. 186 (1962)], as are decisions of Cabinet Officers regarding the use of federal funds for highway construction [Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (Secretary of Transportation)] and even the decisions of the President of the United States with his claim of executive privilege [United States v. Nixon, ____ U.S. _____, 94 S.Ct. 3090 (1974)], it is an effrontery to claim that a decision of a minor officer of the State Department is beyond judicial review.

In light of the background and function of a consul, there seems to be no valid reason for immunizing his actions from judicial scrutiny. The consul, or more accurately, the vice consul in most instances, is usually a recent graduate from college and made a Foreign Service Officer upon satisfactory performance on intelligence testing and personality appraisals. 22 C.F.R., Part 11. He (or she) is not required to have a law degree and rarely has one. Before assignment abroad, their training in visa work is minimal because their primary function is one of a commercial nature. Black's Law Dictionary,

Fourth Edition, p. 388 (1951); 22 C.F.R., Part 101. However, they also serve the educational, personal and emergency needs of United States citizens abroad as well as the public relation interests of their country. 22 C.F.R., Part 71. A foreign consul usually has no law books on hand, and if the consulate is small, the consular officer might perform visa functions while attending to commercial matters, arranging for transportation of American citizens without money, officiating at the taking of depositions and numerous other functions. If the consulate is large, the consular officer might occupy his time solely with immigration matters and he might have had considerable experience, or none whatsoever.

The consul always speaks a second language, but might be assigned to a consulate where he doesn't use it. His office staff usually consists of "locals", mostly natives of the country where the consulate is located. Many matters are handled by his staff preliminarily to the consul's visa decision, and in accordance with the individual's own criteria. Thus, the case presented to the consul for his signature, is usually prepared for him by his foreign staff. To argue as Appellees do, that a decision of a foreign consul, which can deprive an American wife of her spouse, should be beyond the jurisdiction of a Court is unjustifiable and morally indefensible.

Furthermore, the danger inherent in the Appellees' position becomes apparent in the unreported decision in

MacDonald v. Kleindienst, 72 Civ. 1228 (CHT), dated May 6, 1974 (hereinafter referred to as "MacDonald #2). Following the decision in MacDonald #1 (38a-43a), which remanded the case to the Department of State to set forth reasons for refusing to issue visas to four Cubans, the Department then conceded that it did not have sufficient information to deny a visa to one of the Cubans. * Without providing Burrafato with the specific statutory basis for the denial or the factual information upon which the denial was based, Burrafato is placed in a similarly dangerous position of being permanently banished from this country without any reason, or perhaps based upon erroneous information.

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* Also the Department of State in responding to the Court's instructions concerning the denial of visas on the grounds of membership in the Communist Party, stated that the visas were not denied under Section 212(a)(27)or (29), 8 U.S.C. Sec. 1182 (a)(27) or (29) but rather under subdivision (a)(28), thus implicitly adhering to the Appellants' contention that Section 212(a)(27) of the Act, 8 U.S.C. Sec. 1182(a)(27) refers to political subversives, not criminal subversives, MacDonald #2 Slip opinion, p.3.

POINT II

APPELLEES OTHER ARGUMENTS ARE EQUALLY WITHOUT MERIT

The Appellees argue that the records of the Department of State and consular officers are confidential and therefore beyond judicial scrutiny. Section 222(f) of the Act, 8 U.S.C. Section 1202(f). However the statute which makes such records confidential, is clearly designed to protect the privacy of the individual visa applicant and to preclude inspection of his file by the public at large. The statute was not designed to prohibit the applicant from knowing the information contained in the file which pertains to him. Moreover, consistent with the Appellants' contention is the State Department's own regulations which confer upon the alien a legal right to be informed of the factual and statutory basis of the visa denial and to provide him with an opportunity to overcome the derrogatory information alleged against him. 22 C.F.R. Section 42.130(a).

The Appellees also argue that Burrafato has no constitutional right to enter the United States and that his citizen wife has no constitutional right to have her spouse admitted. We agree, of course, that no alien can claim a constitutional right to enter the United States. However, the real issue is whether an alien, lawfully married to a United States citizen, can be permanently expelled from this country and separated from his family, in total disregard of the law. In the present case, Burrafato was classified by the Immigration and Naturalization Service as an "immediate relative" on the basis of his marriage in 1961 to a United States citizen. Section 201(b) of the Act,

8 U.S.C. Section 1151(b). Based upon this classification, Burrafato can seek admission to this country as a permanent resident without regard to the numerical limitations imposed upon visa applicants. Section 201(a) of the Act, 8 U.S.C. Section 1151(a). To argue, as Appellees do, that Burrafato can now be prevented from receiving the benefits of this statute and to deny him a permanent resident visa, without informing him of the basis of the denial, is contrary to law and wholly obnoxious to our system of jurisprudence that we are a country of laws, not men.

Similarly, to argue that a United States citizen wife has no claim to redress in our Courts to prevent the unjustified separation of her spouse from herself and her children, without due process of law, is equally abhorent. Clearly, the interests of Mrs. Burrafato are among those protected by the Fifth Amendment and encompassed in its protection from deprivation of liberty without due process of law. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court quoted with approval the following language from Meyer v. Nebraska, 262 U.S. 390, 399:

> "While this Court has not attempted to define with exactness the liberty... guaranteed (by the Fifth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to... marry, establish a home and bring up children..."
> 408 U.S. at 572.

The Appellants submit, that along with the right to marry, establish a home, and raise a family, is the right to the comfort and consortium of one's spouse, a right Appellees seek to deny in this case, without due process of law.

CONCLUSION

The decision of the District Court must be reversed and the matter remanded with instructions to issue the visa or to provide a sufficient justification to support the visa denial.

Respectfully submitted,

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Appellants
515 Madison Avenue
New York, N.Y. 10022

JOSEPH P. MARRO
MARTIN L. ROTHSTEIN

Of Counsel.

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

JOSEPH P. MARRO, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age, and is employed in the law offices of Fried, Fragomen & Del Rey, P.C. at 515 Madison Avenue, New York, New York. That on the 5th day of May 1975 deponent served the within Appellants' Reply Brief upon the attorney(s) for Appellees in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

U.S. Attorney's Office
225 Cadman Plaza
Brooklyn, N.Y.
Att: Peter Goldman AUSA

Joseph P. Marro

Sworn to before me, this 5th day of May 19 75

Alberta M. Poland

ALBERTA M. POLAND
NOTARY PUBLIC, STATE OF NEW YORK
NO. 60-4601241
QUALIFIED IN WESTCHESTER COUNTY
COMMISSION EXPIRES MARCH 30, 19 76